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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HAROLD JAMES BAERT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the due process clause of the federal constitution compel a state to apply the highest state court's admittedly erroneous prior interpretation of a state statute and federal law (regarding the intent to kill as a prerequisite to the imposition of capital punishment) to a murder committed before the state court recognized and corrected its error?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW - RULE 21.1(d)	3
JURISDICTION - RULE 21.1(e)	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED - RULE 21.1(f)	5
STATEMENT OF THE CASE - RULE 21.1(g), (h)	6
REASONS FOR ALLOWANCE OF THE WRIT - RULE 21.1(j)	10
CONCLUSION	18
APPENDIX	
Opinion and judgment below	A-1
State Supreme Court's denial of review	A-12
Application for stay of remittitur and order for stay	A-13
California Penal Code section 190.2	A-15

TABLE OF AUTHORITIES

CASES	Pages
American Railway Express Co. v. Levee, 263 U.S. 19 (1923)	4
Bouie v. Columbia, 378 U.S. 347 (1964)	3, 8-10, 12-16
Carlos v. Superior Court, 35 Cal.3d 131 (1983)	2, 3, 8-12, 15, 17, 18
Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987)	17
Enmund v. Florida, 458 U.S. 782 (1982)	2
In re Baert 205 Cal.App.3d 514 (1988)	1, 3, 9-10, 13, 15
Marks v. United States, 430 U.S. 188 (1977)	3, 8-10, 12-16
Memoirs v. Massachusetts, 383 U.S. 413 (1966)	16
Michigan v. Long, 463 U.S. 1032 (1983)	1
Miller v. California, 413 U.S. 15 (1973)	15, 16

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 4

People v. Anderson, 43 Cal.3d 1104 (1987) 2, 3, 8-13, 15, 16

People v. Easter, 197 Cal.App.3d 183 (1987) 11

People v. Garcia, 36 Cal.3d 539 (1984) 11

People v. Lee, 43 Cal.3d 666 (1987) 11

People v. Malone, 47 Cal. 3d 1 (1988) 12

People v. Poggi, 45 Cal.3d 306 (1988) 11

People v. Sobiek, 30 Cal.App.3d 458 (1973) 15

United States v. Polizzi, 493 F.2d 570 (3rd Cir. 1974) 17

UNITED STATES CONSTITUTION

Article I, § 9, cl. 3 5

Article I, § 10, cl. 1 5

14th Amendment 5, 10

CALIFORNIA STATE CONSTITUTION

Article I, § 7(a) 5

Article I, § 15, cl. 7 5

Article I, § 9 5

STATUTES

UNITED STATES CODE

Title 28, Section 1257(3) 4

Title 28, Section 2403(b) 5

CALIFORNIA PENAL CODE

Section 190.2 6, 9, 11, 12, 16

Section 190.2(a)(17), (b) 2, 6, 8, 10, 12

MISCELLANEOUS

UNITED STATES SUPREME COURT RULES

Rule 17.1(c) 10

Rule 21.1(d) 3

Rule 21.1(e) 4

Rule 21.1(f)	5
Rule 21.1(g), (h)	6
Rule 21.1(j)	10
Rule 28.4(c)	5

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PETITION FOR WRIT OF CERTIORARI

The People of the State of California petition the Court for a writ of certiorari to review the judgment and opinion of the Court of Appeal for the State of California, Second Appellate District, Division Three, published as *In re Baert* 205 Cal.App.3d 514, 252 Cal.Rptr. 418 (1988). The decision of the Court of Appeal appears to rest upon federal grounds.[1]

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1. As said in *Michigan v. Long*, 463 U.S. 1032, 1040, 77 L.Ed.2d 1201, 1214, 103 S.Ct. 3469, 3476 (1983):

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

This case, therefore, involves a federal question, namely, "Does federal law now force California to apply an incorrect statutory interpretation in prosecuting an alleged murderer?"

The statute here under consideration, enacted by the voters, makes certain murderers eligible for the death penalty whether they intended to kill their victims or not.[2] Respondent Harold Baert is charged under that statute with murdering Janet McAlindon. Before she was killed, the highest state court interpreted the statute unrealistically[3] to require proof that the murderers intended to kill before they could be subjected to the death penalty. The state court did this in order to "steer[] clear of constitutional obstacles,"[4] and save the statute from possible invalidity under federal law garnered from its reading of a case of this Court[5]. However, after the alleged murder of Mrs. McAlindon, the California Supreme Court recognized it had erroneously read the federal law[6] and corrected its error of statutory construction,[7] noting, as it did so, that the statute "is not realistically susceptible of two interpretations."[8]

The question is raised, "In order to seek Baert's eligibility for the death penalty, does federal law require the prosecution to proceed under the incorrect interpretation of the statute because of the fact that the victim was killed after the Califor-

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2. CAL. PENAL CODE § 190.2(a)(17), (b); *People v. Anderson*, 43 Cal.3d 1104, 1115, 1147 (1987).

3. *Anderson*, 43 Cal.3d at 1146.

4. *Carlos v. Superior Court*, 35 Cal.3d 131, 152 (1983), overruled in *Anderson*, 43 Cal.3d at 1115, 1147.

5. *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982). See *Carlos*, 35 Cal.3d at 148-151, and *Anderson*, 43 Cal.3d at 1139-1141, 1146.

6. *Anderson*, 43 Cal.3d at 1139-1140, 1146-1147.

7. *Id.* at 1147-1148, 1149-1150.

8. *Id.* at 1146.

nia Supreme Court misconstrued the statute (in *Carlos v. Superior Court*, 35 Cal.3d 131) and before the Court's announcement of its mistake (in *People v. Anderson*, 43 Cal.3d 1104)?"[9] The Court of Appeal in this case looked to this Court's opinions in *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964), and *Marks v. United States*, 430 U.S. 188, 51 L.Ed.2d 260, 97 S.Ct 990 (1977), and said, "Yes."

However, the People of the state, who by initiative enacted the provisions at issue in this case, contend otherwise. Murderers who killed during the period between announcement of the misinterpretation in one state supreme court case and its renunciation in another, and who have yet to be tried, can lawfully be punished under the plain and correct interpretation of the statute, at least in the absence of any evidence that the murderer actually relied on the incorrect interpretation in killing his victim.

OPINIONS BELOW - RULE 21.1(d)

The opinion delivered by the court below, published in the official California reports, is *In re Baert*, *supra*, 205 Cal.App.3d 514. In addition, that opinion can be found in the appendix at pages A-1 to A-11. The order of the California Supreme Court denying the petition for review of the opinion of the Court of Appeal is in the appendix at page A-12. The order of the Court of Appeal staying issuance of the remittitur is in the appendix at page A-14; see also A-14.

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9. Murderers who killed before *Carlos* or after *Anderson* do not get the benefit in California of the misconstruction of law. Thus, the issue presented in this case relates to the "window period" between *Carlos* and *Anderson*. See the discussion at page 11, *post*.

JURISDICTION - RULE 21.1(e)

The California Court of Appeal, Second Appellate District, Division Five, entered its judgment and opinion on October 26, 1988. On December 5, 1988, the People timely filed with the California Supreme Court a petition for review of the decision of the Court of Appeal. On January 19, 1989, the petition was denied.

Title 28, United States Code, section 1257(3), confers jurisdiction on the Court in this case. Even though proceedings on the merits are yet to come in the state courts, the federal issue "will not survive for this Court to review, regardless of the outcome of the proceedings on remand." *Pennsylvania v. Ritchie*, 480 U.S. 39, _-_, 94 L.Ed.2d 40, 51, 107 S.Ct. 989, 996-997 (1987). If review were denied at this point, then, should respondent Baert be convicted following trial, the People's "ability to obtain review will rest on [Baert]'s willingness to appeal." 480 U.S. at _, 94 L.Ed.2d at 52. If, on the other hand, Baert is acquitted, the People "will be barred from seeking review by the Double Jeopardy Clause. [Citations.] Therefore, if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future." *Ibid.* Nor can the People in anyway resist the order of the Court of Appeal to preserve the issue on the hearing of a contempt citation for its prosecutor. 480 U.S. at _, 94 L.Ed.2d at 52-53, fn. 8. The order of the Court of Appeal is directed to the trial court, not the prosecution. Appendix at A-11 [205 Cal.App.3d at 523].

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a writ of certiorari runs from the date of the higher court's refusal to review. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 68 L.Ed. 140, 143, 44 S.Ct.

11, 12 (1923). Since filed within 60 days of the California Supreme Court's denial of review, this petition is timely.

Title 28, United States Code, section 2403(b), may be applicable. Rule 28.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED - RULE 21.1(f)

"No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST., art. I, § 9, cl. 3.

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST., art. I, § 10, cl. 1.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST., amend. XIV, § 1.

"A person may not be deprived of life, liberty or property without due process of law . . . ." CAL. CONST., art. I, § 7(a).

"A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." CAL. CONST., art. I, § 9.

"Persons may not . . . be deprived of life, liberty, or property without due process of law." CAL. CONST., art. I, § 15, cl. 7.

"The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case

in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

" . . . .

"(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

"(i) Robbery in violation of Section 211.

" . . . .

"(iii) Rape in violation of Section 261.

" . . . .

"(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs . . . (17) . . . of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true." CAL. PEN. CODE § 190.2(a)(17), (b).[10]

STATEMENT OF THE CASE - RULE 21.1(g), (h)

At a preliminary hearing held before the magistrate on October 19 and 29, 1987, the evidence tended to establish the following:[11] A coworker left Robert McAlindon's wife Janet to close up the offices of the Pomona Valley Eye Surgery Medical Group at 4:45 p.m. Friday, the 21st day of August, 1987. Ex. D, Reporter's Transcript of Oral Proceedings,

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10. The full text of section 190.2 is set forth verbatim at pages A-16 to A-20 of the appendix.

11. References to exhibits are to those filed by Baert in support of his Petition for Writ of Habeas Corpus in the Court of Appeal.

hereinafter RTP, 5, 29-30, 35-36B. About three weeks before, while canvassing the neighborhood for his employer, respondent Baert had seen Janet talking to "another nurse" in front of the medical building. *Id.* at 115. He claimed "that she was the person that he wanted to get" to fulfill his fantasies about raping a nurse and rendering a female unconscious and then having sex with her. *Id.* at 115-116. He claimed he also liked to dress in women's clothing and masturbate while so dressed. *Id.* at 123. On the 21st, when Janet came out of the medical building, Baert was waiting for her. He had hidden himself around a corner, and as Janet came around that corner, Baert threw a ligature around her neck and dragged her behind a dumpster at the rear of the building. He strangled her into unconsciousness, removed all of her clothing and raped her. *Id.* at 109-110, 117-119. When Janet regained consciousness, Baert beat her about the head and, with his palm on her forehead, bashed the back of her head onto a concrete slab, lacerating the skin covering the back of her skull. *Id.* at 8-10, 117. He then strangled her vigorously enough to kill her. *Id.* at 5-7, 117. Baert took all of her clothing and other personal belongings and fled, leaving behind only the corpse and a sheet upon which he had raped her. *Id.* at 32, 111, 112, 115. After his arrest, Baert claimed a therapeutic effect from this murder. *Id.* at 116.

On November 3, 1987, as a result of the evidence presented at the preliminary hearing, *id.* at 147-148, Baert was arraigned on, and pled not guilty to, an information filed in the Superior Court of the State of California, County of Los Angeles, charging him with the murder of Janet McAlindon. Ex. A, Information; Ex. B, minute order of Nov. 3, 1987. The information alleged, as among special circumstances making him eligible for the death penalty, that the murder was committed by Baert while he was "engaged in the commission of the crime[s] of" rape, attempted rape and robbery. Ex. A.

During proceedings prior to the attachment of jeopardy, Baert moved that the court instruct the jury at trial to decide the special circumstance allegations in accordance with the interpretation given to California Penal Code section 190.2, subdivisions (a)(17) and (b), by the State Supreme Court in the case of *Carlos v. Superior Court*, 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862 (1983), overruled in *People v. Anderson*, 43 Cal.3d 1104, 1115, 240 Cal.Rptr. 585, 742 P.2d 1306 (1987). Ex. C, Reporter's Transcript of May 31, 1988, hereinafter RT1, 141:13-14 and 183:16-19.[12]

(In *Carlos*, the California Supreme Court doubted "that a screening device which included" accidental killers "would meet the United States Supreme Court's test" as to which cases of murder warrant the death penalty. 35 Cal.3d at 151. The state Court took its doubt as to federal constitutionality as reason to construe subdivisions (a)(17) and (b) of section 190.2, which it viewed as ambiguous, *id.* at 139-143, 147, as requiring proof of the actual killer's intent to kill in cases where death penalty eligibility was premised upon felony-based special circumstances. *Id.* at 147-153. Subsequently, the California Supreme Court overruled *Carlos* in the *Anderson* case, saying in the latter that the statute (1) is not ambiguous when "given a fair reading," 43 Cal.3d at 1143, and (2) does not require proof of intent to kill to make the actual killer eligible for the death penalty when a felony-based special circumstance exists. *Id.* at 1147.)

Baert argued in support of his jury instruction motion that, according to this Court's decisions in *Bouie v. Columbia*, 378 U.S. 347, and *Marks v. United States*, 430 U.S. 188, and because the murder of Mrs. McAlindon "occurred after the 1983 *Carlos* opinion but before the date of the decision in *People versus Anderson*, this crime being August 21st, 1987,

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12. References are to pages and lines of the reporter's transcripts contained in the exhibits.

Anderson being October 13th, 1987," RT1 142:5-13, he would be denied his right to due process, unless the trial court were to instruct the jury, as *Carlos* would have required, that the jury must find that the killing was intentional before it could return a finding of the truth of the above special circumstances. RT1 142-149.

The prosecution opposed Baert's motion, arguing that "it is not a constitutional denial of due process" to deny murderers the benefit of *Carlos*, RT1 168:10-14, and the Superior Court agreed, denying the motion and finding "that due process is not offended by the application of the *Anderson* case to this particular defendant." RT1 178:4-6. The parties agreed to interruption of the trial and a continuance, Reporter's Transcript of June 1, 1988, hereinafter RT2, at 218-221, and Baert sought review of the Superior Court's ruling by means of a petition for writ of habeas corpus filed in the Court of Appeal. In the petition, Baert continued to rely upon *Bouie* and *Marks* and argued that his "right to due process of law" as an accused, Petn. for Writ of Habeas Corpus, hereinafter HC, at 19, would be violated unless he were permitted the benefit of *Carlos*'s interpretation of section 190.2. HC at 19-21, 26. The People opposed issuance of the writ on the grounds that due process was satisfied by the notice given Baert by the special circumstances statute itself of the special punishment warranted by the murder, Return and Answer to Petn. for Writ of Habeas Corpus, hereinafter RET, at 10-11, Petn. for Rehg., hereinafter REH, at 3-4, and that the principles expressed in *Bouie* and *Marks* either were not intended to apply, RET at 11-16, or had not been shown to apply, *id.* at 14, fn. 13, REH at 2, to the circumstances of this case.

The Court of Appeal granted Baert's petition for a writ and directed the trial court "to instruct in conformance with *Carlos v. Superior Court*, 35 Cal.3d at 153-154." Appendix at A-11 [205 Cal.App.3d at 523]. In ordering the trial court to

instruct the jury on the law as stated by *Carlos* rather than *Anderson*, the Court of Appeal found "that to try [Baert] under the law now expressed in *Anderson* would create exactly the situation condemned in *Bouie* . . . ." Appendix at A-9 [205 Cal.App.3d at 517-521]. The People petitioned the California Supreme Court for review of the decision of the Court of Appeal, expressing the conclusion that extension of the ex post facto analogy of *Bouie* and *Marks* to cases such as Baert's "exalts form over substance." Petn. for Rev. at 10. The state Court denied review. Appendix at A-12.

On February 2, 1989, Appendix at A-14, and on petitioner's application, Appendix at A-14 to A-15, the Court of Appeal ordered issuance of its remittitur stayed to March 22, 1989, and thereafter, upon the timely filing of this petition, until final adjudication of the proceedings in this Court. Appendix at A-15.

REASONS FOR ALLOWANCE OF THE WRIT - RULE 21.1(j)

A court of the State of California has in this case "decided an important question of federal law which has not been, but should be, settled by this Court, ..." Rule 17.1(c). In essence, the Court of Appeal decided that the Due Process Clause of the 14th Amendment forces the state to apply an incorrect interpretation of a criminal statute, when the State Supreme Court has announced that interpretation, and, though the State Supreme Court has later corrected the interpretation, it remains uncorrected when the criminal acts.

The California Penal Code includes as special circumstances making a murderer eligible for the death penalty, those in which the murder was committed while the defendant was engaged in the commission or attempted commission of certain felonies, including robbery and rape. CAL. PEN. CODE § 190.2(a)(17), (b). In *Anderson*, 43 Cal.3d at 1147, the California Supreme Court held that "intent to kill is not an

element of the felony-murder special circumstance;" and that such intent must be proved only as to aiders and abetters and not as to the actual killer. *Id.* at 1147-1148; see also 1149-1150.

Anderson was decided on October 13, 1987, overruling the decision in *Carlos v. Superior Court*, 35 Cal.3d 131. Expressing a doubt that any other interpretation would not withstand scrutiny by this Court as a matter of federal constitutional law, *id.* at 151, *Carlos* had said that the statute, enacted by the voters by an initiative in 1978, required proof of intent to kill to sustain a finding of the truth of the felony-murder special circumstances. 35 Cal.3d at 135, 153-154. Although it was not decided until December 12, 1983, the State Supreme Court gave *Carlos* retroactive effect. *People v. Garcia*, 36 Cal.3d 539, 547-549, 205 Cal.Rptr. 265, 684 P.2d 826 (1984).[13] However, beginning with the decision in *Anderson*, the California courts have applied *Anderson*'s holding, 43 Cal.3d at 1138-1148, to murders committed before *Carlos* became final. See, e.g., *People v. Poggi*, 45 Cal.3d 306, 326-327, 246 Cal.Rptr. 886, 753 P.2d 1082 (1988), *modified* 45 Cal.3d 743c [1980 murder], *Anderson* itself, 43 Cal.3d at 1115 [1979 murder]; *People v. Easter*, 197 Cal.App.3d 183, 242 Cal.Rptr. 746 (1987). Thus, *Anderson* applies to all murders committed after passage of the 1978 death penalty law, with the possible exception, if the opinion below in this case is permitted to stand, of those committed between the time *Carlos* became final and *Anderson* was announced.

There is now no question that California statutes provide, and provided, following the enactment of section 190.2, that persons who murder in the course of certain felonies are eligible for the death penalty whether or not they intended to kill. "*Carlos* itself concluded the statute was

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13. Overruled on other grounds in *People v. Lee*, 43 Cal.3d 666, 676, 238 Cal.Rptr. 406, 738 P.2d 752 (1987).

ambiguous with respect to the requirement of intent to kill for a felony-murder special circumstance." *People v. Malone*, 47 Cal. 3d 1, 25, 252 Cal.Rptr. 525, 762 P.2d 1249 (1988), *modified* 47 Cal.3d 745a.

After *Carlos*, however, *Anderson* not only concluded that the statute was not ambiguous but that it was unreasonable to interpret the statute in such a way as to require intent to kill as an element of the felony-murder special circumstance. Read fairly, and in conjunction with subdivision (b), subdivision (a)(17) "can realistically be read only to require intent to kill for the aider and abetter but not for the actual killer." 43 Cal.3d at 1145. Since "section 190.2(a)(17) is not realistically susceptible of two interpretations," *Anderson* at 1146, *Carlos*'s interpretation of the section was unrealistic. There is no "*realistic* doubt as to the meaning of section 190.2(a)(17): the fair import of the provision is that intent is not an element of the felony-murder special circumstance." *Anderson* at 1146. *Carlos* mistakenly said the statute was ambiguous. *Anderson* at 1143. The Supreme Court recognized the mistake, and suggested (1) that *Carlos* overrode "'common sense and evident statutory purpose,'" *Anderson* at 1146, and (2) that for any murderer to be given the benefit of a doubt as to the statute's meaning would require that the murderer be given the benefit of an unreasonable doubt, *id.* at 1145-1146, something to which even a murderer is not entitled. The People of the state believe, therefore, that Baert had all the notice due process required and that he should not be presumed to have acted out his crime in reliance upon an unreasonable judicial misconstruction of what had been, and remains, a clear expression of the California electorate's will in section 190.2.

The People of the state respectfully urge that *Bouie* and *Marks* not be read as changing this, and believe that the Court of Appeal's reliance upon those cases unfairly stretches the doctrine of federal due process they announced. That

doctrine, the judicial analogy to the ex post facto prohibitions found in the United States Constitution, Art. I, §§ 9, 10, is built around the fundamental "notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties." *Marks*, 430 U.S. at 191.

Although the Court of Appeal makes reference to that notion, Appendix at A-4 [205 Cal.App.3d at 518], it aseptically removes its discussion from the facts of Baert's case and similar cases and, as a result, fails to recognize that to apply the correct interpretation of the state statute which distinguishes among the worst murderers is not unfair in this or similar cases. In attempting to justify its decision, the Court of Appeal surprisingly described the distinction between the unforeseeable judicial redefinition of the South Carolina trespass statute to encompass otherwise innocent actions of civil rights activists, in *Bouie*, and *Anderson*'s resurrection of the voters' intent in enacting the California statute punishing the worst murderers as "one of degree." Appendix at A-9 [205 Cal.App.3d at 521]. Said the Court of Appeal, as "[i]n *Bouie*, the defendants were denied the right to defend against conviction on the ground that no law penalized their conduct at the time they acted," Appendix at A-10 [205 Cal.App.3d at 522], so in this case, "application of *Anderson* would deny [Baert] the right to defend against a possible death sentence on the ground that without proof of intent the law did not categorize his conduct as a capital offense at the time he acted." Appendix at A-10 [205 Cal.App.3d at 522].

But the present situation is different from *Bouie*, both in its underlying facts, and in the nature of the judicial action taken concerning the statute in each case.

> In *Bouie* . . . , the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court: '[A]n unforeseeable judicial

> enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . . .'

Marks, 430 U.S. at 192. The language of the trespass statute considered in *Bouie* was "'narrow and precise,' 378 U.S., at 352, and that fact was important to [this Court's] holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning." *Marks*, 430 U.S. at 195.

Why? Because in the state case underlying *Bouie*, South Carolina authorities engrafted otherwise innocent conduct into a criminal statute, the language of which could not bear it. A conviction resulted on proof that students sat awaiting service in a booth in a drug store lunch counter during business hours after being ordered to leave. *Bouie*, 378 U.S. at 348-349. For its violation, the statute defining the trespass required, by its terms, entry after notice prohibiting entry. *Id.* at 349. The store had, however, invited the students' entry, and the students received no notice prohibiting their entry into the restaurant or booth. *Id.* at 350. On the students' appeal from their convictions, the South Carolina Supreme Court construed the trespass statute in a manner "clearly at variance with the statutory language [and without] the slightest support in prior South Carolina decisions," *id.* at 356, to include the conduct of the students in "remaining on the premises after receiving notice to leave." *Id.* at 350. This Court forbad retroactive application of the new construction to the students, *id.* at 362, because they "had no fair warning of the criminal prohibition under which" they were convicted. *Id.* at 361. "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Id.* at 354. The Court noted that application of the rule against applying the construction retroactively was "par-

ticularly compelling where . . . the []conduct cannot be deemed improper or immoral." *Id.* at 362; see also *People* v. *Sobiek*, 30 Cal.App.3d 458, 474, 106 Cal.Rptr. 519, 82 A.L.R.3d 804 (1973).

The difference between the statutory application sought by South Carolina in *Bouie* and that sought here by the People of the State of California cannot be accurately characterized, as it was by the opinion below, as merely "one of degree." Appendix at A-9 [205 Cal.App.3d at 521]. In *Bouie*, after all, the state courts extended the reach of the trespass statute far beyond its wording to sustain convictions for otherwise innocent and morally upright acts -- awaiting service in a lunch counter area, while in the instant case, the question is whether the worst of murderers should be punished *as provided by the statute* for killing people while they rape and rob them. Furthermore, it was not *Anderson* that construed the California felony-based special circumstance statute "at variance with the statutory language," 378 U.S. at 356, but *Carlos. Anderson*, 43 Cal.3d at 1145. Here it is Baert who here seeks to rely upon the misinterpretation of the statute's language, not, as in *Bouie*, the state. And that statute, construed in accordance with its language in *Anderson*, punishes conduct which can "be deemed improper or immoral" in the extreme. 378 U.S. at 362.

What does *Marks*, another case of this Court relied upon by the court below, add to this analysis? Where the *Bouie* decision rests upon an unforeseeable construction at variance with the language of a "narrow and precise" statute, the *Marks* case involved a pornography statute of "sweeping language[,]" the reach of which "necessarily ha[d] been confined within the constitutional limits announced by" this Court. *Marks*, 430 U.S. at 195. This Court noted that the 1973 *Miller*

decision[14] relaxed restrictions imposed on the prosecution of pornographers in the 1966 *Memoirs* case.[15] The defendants in *Marks*, "engaged in the dicey business of marketing films subject to possible challenge, [and] had no fair warning that their products might be subjected to the new standards," *Marks* at 195, announced in *Miller* months after their activities. The Court said it has "taken special care to insist on fair warning when a statute regulates First Amendment values[,]" that the statute involved was such a statute, and that, therefore, "in accordance with *Bouie*," the relaxed standards on prosecution in *Miller* could not retroactively apply to the defendants in *Marks*. *Marks* at 196.

Thus, in the past, this Court has not permitted retroactive effect to judicial decisions against criminal defendants (1) when a court unforeseeably construes a "narrow and precise" criminal statute at variance with its language, thereby enabling prosecution of conduct which is not "improper or immoral[,]" (in *Bouie*), and (2) when a court construes a "sweeping" statute regulating expression and necessarily depending on judicial construction for a constitutional meaning at variance with an earlier statement of the applicable law (in *Marks*). What this Court has not done is to forbid retroactive effect against criminal defendants when a court construes a "narrow and precise" criminal statute, such as the California felony-murder special circumstance, in accord with its plain language, as in *Anderson*, thereby enabling prosecution of the most "improper or immoral" conduct, as Baert's alleged conduct is, and the statute does not regulate expression or depend upon a judicial construction for a constitutional meaning, as section 190.2 does

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14. *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973).

15. *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966).

not. What this Court has not yet done, however, is just what the Court of Appeal, relying on its view of federal law, did in this case.

Finally, even if there were cases in which murderers could claim that in killing they had actually relied upon a statutory interpretation by the state's highest court, so far, this is not such a case. In denying Baert's motion for *Carlos* jury instructions, the trial court found that it "could only speculate whether Mr. Baert was aware of the *Carlos* decision" and that it would have to speculate further as to whether or not, in the conduct of the murder with which he is charged, Baert's actions were "in reliance upon the interpretation of the [felony-based] special circumstances [] mentioned in the *Carlos* decision." RT1 at 175:7-12. The present case therefore does not fall within that narrow class of federal decisions suggesting that a criminal may obtain refuge from a correct interpretation of the law defining his crime and its punishment by actual reliance upon an incorrect interpretation uttered by the courts. See *Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir. 1987); also see *United States v. Polizzi*, 493 F.2d 570 (3rd Cir. 1974) (incorrect interpretation of statute might be applied to avoid injustice if defendant could establish good faith reliance in fact upon overruled decision).

CONCLUSION

Federal law does not require that murderers escape their eligibility for the death penalty when prosecuted pursuant to the clear language of a state statute which had been tarnished by an erroneous judicial opinion that misjudged federal law . In any event, as a matter of federal law, Baert has not shown that the killer of Mrs. McAlindon relied upon the State Supreme Court's error in *Carlos* and, for that additional reason, should not benefit from it.

The People of the State of California therefore respectfully pray that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

IRA REINER
District Attorney
County of Los Angeles, California

By

HARRY B. SONDHEIM
Head Deputy
Appellate Division

BRENT RIGGS
Deputy District Attorney

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re	)	2d Crim. No. B036262
	)	(Super.Ct.No. A-886494)
HAROLD JAMES BAERT,	)	
	)	Court of Appeal -
Petitioner,	)	Second District
	)	FILED
On Habeas Corpus.	)	OCT 26 1988
	)	Robert N. Wilson Clerk
	)	
		Deputy Clerk

PETITION for writ of habeas corpus. Granted. Robert Martinez, Judge.

WILBUR F. LITTLEFIELD, Public Defender, Laurence M. Sarnoff, Alan Abajian, Henry J. Hall, Deputy Public Defenders, for Petitioner.

IRA REINER, District Attorney, Harry B. Sondheim, Brent Riggs, Deputy District Attorneys, for Respondent.

INTRODUCTION

"No one can be criminally punished in this country, except according to a law prescribed for his government by the

sovereign authority before the imputed offense was committed, and which existed as a law at the time." (*Kring* v. *Missouri* (1882) 107 U.S. 221, 235.) Guided by this fundamental principle of due process, we confront the question, not yet addressed in the wake of *People* v. *Anderson* (1978) 43 Cal.3d 1104, whether its holding eliminating intent to kill as an element of the felony-murder special circumstance (Pen. Code, § 190.2, subd. (a)(17)) may be applied retroactively to crimes committed during the period when *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131, required proof of intentionality. In our resolution, we answer that it may not.[1/]

FACTUAL AND PROCEDURAL BACKGROUND

The facts are not in dispute: Petitioner, Harold James Baert, stands accused of murder (Pen. Code, § 187), forcible rape (Pen. Code, § 261, subd. (2)), and robbery (Pen. Code, § 211). Of relevance to the matter before us, the prosecution also charged pursuant to Penal Code section 190.2, subdivision (a)(17), that he committed the murder while engaged in the commission of rape, attempted rape, and robbery. If found to be true, the special circumstance would subject petitioner to a possible death sentence. (Pen. Code, §§ 190, 190.2, subd. (a)(17).)

1/ The California Supreme Court has already determined that *People* v. *Anderson* may be applied retroactively to offenses committed prior to the finality of *Carlos* v. *Superior Court*. (See *People* v. *Poggi* (1988) 45 Cal.3d 306, 326-327; *People* v. *Gates* (1987) 43 Cal.3d 1168, 1192-1193, cert. den. *sub nom. Gates* v. *California* (1988) ___ U.S. ___, 100 L.Ed.2d 236, 108 S.Ct. 2005; see also *People* v. *Easter* (1987) 197 Cal.App.3d 183, 186.) We find nothing in our analysis or conclusion inconsistent with that determination.

The information alleged the date of the offenses as August 21, 1987. On October 13, 1987, the California Supreme Court rendered its decision in *People* v. *Anderson*, *supra*, in part overruling the holding in *Carlos* v. *Superior Court*, *supra*, requiring proof of an intentional killing to sustain a felony-murder special circumstance finding pursuant to Penal Code section 190.2, subdivision (a)(17).

Asserting that the intentionality requirement was the effective law at the time of his crimes and that the preliminary hearing testimony contained no evidence of this requisite intent, petitioner moved to strike these special circumstance allegations. (Pen. Code, § 995.) The trial court denied the motion and indicated it would not instruct the jury, consistent with *Carlos*, that intent to kill was a necessary element of the felony-murder special circumstance. After a discussion amongst the court and counsel, the parties agreed to a continuance so that petitioner could seek pretrial review of this ruling. The prosecution also desired resolution of the issue since it intended to allow petitioner to plead guilty for life imprisonment without possibility of parole if required to prove he intended to kill his victim.

Petitioner sought review by petition for writ of habeas corpus. (See Pen. Code, § 1487; *In re Berry* (1968) 68 Cal.2d 137, 145-146; *In re Bell* (1942) 19 Cal.2d 488, 492-495.) We issued an order to show cause directing the Los Angeles County District Attorney's Office to file an answer (return); and petitioner has also filed a traverse.

DISCUSSION

We begin with a brief explanation of relevant constitutional principles. Both the United States and California Constitutions forbid the enactment of ex post facto laws. (U.S. Const., art. I, §§ 9, 10; Cal. Const. art. I, § 16.) An ex post

facto law is "any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." (*Beazell* v. *Ohio* (1925) 269 U.S. 167, 169-170; *Bouie* v. *Columbia* (1964) 378 U.S. 347, 353.)

"The Ex Post Facto Clause is a limitation upon the powers of the legislature, [citation], and does not of its own force apply to the Judicial Branch of government. [Citation.] But the principle on which the Clause is based---the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties---is fundamental to our concept of constitutional liberty. [Citations.]" (*Marks* v. *United States* (1977) 430 U.S. 188, 191-192.) "[J]udicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness" (*Pierce* v. *United States* (1941) 314 U.S. 306, 311) and, when "applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids." (*Bouie* v. *Columbia supra*, 378 U.S. at p. 353.)

Thus, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. [Citation.] The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' [citation], must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given

retroactive effect. [Citation.]" (*Id.*, at pp. 353-354; see *Keeler* v. *Superior Court* (1970) 2 Cal.3d 619, 631-636.)

The facts of *Bouie* v. *Columbia*, *supra*, illustrate the operation of the Due Process Clause when it results from judicial rather than legislative change in the law. In *Bouie*, black defendants were convicted under South Carolina's criminal trespass statute when they refused to leave a segregated lunch counter after being asked to do so. On its face, the statute defined as a misdemeanor "'[e]very entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry . . .'" (*id.*, at p. 349, fn.1); and no state appellate court had ever interpreted its scope other than consistent with the plain import of its terms. (*Id.*, at pp. 355-359.) Nevertheless, the South Carolina Supreme Court affirmed the convictions by "construe[ing] the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." (*Id.*, at p. 350, footnote omitted.) Finding this interpretation at variance with the statutory language and unsupported by any prior state court decisions, the United States Supreme Court reversed the convictions as violative of due process. The retroactive application of an unforeseeable judicial expansion of the law failed to provide "the fair warning to which the Constitution entitles [one]." (*Id.*, at p. 354.)

With these considerations in mind, we turn to the facts of the instant case. In *Carlos* v. *Superior Court*, *supra*, 35 Cal.3d 131, the California Supreme Court held "that the felony murder special circumstance of the 1978 [death penalty] initiative requires proof that the defendant intended to kill. Specifically, we construe the word 'intentionally' in subdivision (b) of [Penal Code] section 190.2 to apply to all defendants---actual killers and accomplices alike---and to require an intent to kill before a defendant is subject to a special circumstance

finding under paragraph 17 [of subdivision (a) of that section." (*Id.*, at pp. 153-154.) In *People* v. *Anderson*, *supra*, 43 Cal.3d 1104, the court readdressed this issue, reviewing substantially the same sources in making its redetermination. (*Id.*, at pp. 1139-1147.) However, principally in light of the United States Supreme Court's intervening decision in *Tison* v. *Arizona* (1987) 481 U.S. ___, 95 L.Ed.2d 127, 109 S.Ct. 1676, this reexamination led to an opposite conclusion: "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved before the trier of fact can find the special circumstance to be true." (*People* v. *Anderson*, *supra*, 43 Cal.3d at pp. 1138-1139.)

Unquestionably, *Anderson* effected so substantial a change in the law that retroactive application of a comparable legislative modification would be barred by the Ex Post Facto Clause. Not only does the change prescribe a greater punishment for the same conduct by subjecting the defendant to a possible death sentence without proof of an intent to kill, it also denies a crucial defense to the special circumstance allegation while concomitantly reducing the prosecution's burden of proof on that issue. (See *Lindsey* v. *Washington* (1937) 301 U.S. 397, 400-401; *Beazell* v. *Ohio*, *supra*, 269 U.S. at pp. 169-170.) Moreover, *Anderson* did not merely provide a judicial clarification of Penal Code section 190.2, subdivision (a)(17). (See *Marks* v. *United States*, *supra*, 430 U.S. at p. 194, see also, e.g., *People* v. *Sobiek* (1973) 30 Cal.App.3d 458, 472, cert. den. *sub nom. Sobiek* v. *California*, 414 U.S. 855.) The holding of *Carlos* was unambiguous and consistently applied in accord with its express language. (See *People* v. *Garcia* (1984) 36 Cal.3d 539, 548-549, cert. den. *sub nom. California* v. *Garcia* (1985) 469 U.S. 1229; see also, e.g., *People* v. *Smith* (1986) 187 Cal.App.3d 666, 684-685; *People* v. *Brown* (1985) 169 Cal.App.3d 728, 736-744, cert. den. *sub nom. Brown* v.

California (1988) ___ U.S. ___, 98 L.Ed.2d 667, 108 S.Ct. 717; *People* v. *Kelly* (1985) 163 Cal.App.3d 619, 621-622.)

We have not entered this fray without armor and note that the United States Court of Appeals applied a similar analysis in *Moore* v. *Wyrick* (8th Cir. 1985) 766 F.2d 1253, cert. den. *sub nom. Armontrout* v. *Moore* (1986) 475 U.S. 1032. There, the defendant participated in an attempted robbery that resulted in the inadvertent death of a bystander at the hands of another bystander; and he was convicted of first degree felony murder. In affirming the conviction, the Missouri Supreme Court construed the state felony murder statute to apply to the defendant's conduct even though it had previously determined otherwise under comparable facts. (*Id.*, at p. 1254.) On federal habeas corpus review, the court agreed that the decision "effected a significant change in Missouri's felony murder law as it existed [formerly] and as a result expanded the scope of the felony murder statute beyond its previous boundaries." (*Id.*, at p. 1257.) After further review the earlier state of the law, the court concluded that the change was unforeseeable and thus could not be retroactively applied to the defendant. (*Id.*, at pp. 1257-1259.)

Here, we also find a comparable consistent application of *Carlos*, which, even if short-lived, rendered the about-face in *Anderson* "an unforeseeable judicial enlargement of a criminal statute . . . ." (*Bouie* v. *Columbia*, *supra*, 378 U.S. at p. 353.) Respondent argues that, to the extent petitioner may have relied on the law as judicially interpreted, *Tison* v. *Arizona*, *supra*, should have put him on notice that *Carlos* was infirm and subject to being overruled at any time. At best this argument is based on conjectural suppositions, inferences, and conclusions. *Carlos* was decided by a six-to-one majority; and the court itself acknowledged in *Anderson* its traditional

reluctance to override the impetus of stare decisis. (*People* v. *Anderson*, *supra*, 43 Cal.3d at pp. 1138, 1147.)[2]

Moreover, we do not perceive the holding in *Tison* v. *Arizona*, *supra*, to have signaled a rapid and dramatic change in the interpretation of Penal Code section 190.2, subdivision (a)(17), with respect to the intentionality requirement. The defendants in *Tison* were aiders and abettors, and the decision principally clarified the question of whether they could be subject to the death penalty in light of *Enmund* v. *Florida* (1982) 458 U.S. 782, which held that the ultimate sanction could not be imposed against one who did not kill or attempt to kill during the course of a felony and was not present when the killing occurred. (*Id.*, at p. 801; see *Tison* v. *Arizona*, *supra*, 481 U.S. at p. ___, 95 L.Ed.2d at p. 139, 109 S.Ct. 1676.) Petitioner in this case is not charged as an aider and abettor but as the actual perpetrator of the murder. Thus, even assuming his awareness of this development in the law,

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2/ Although the precise question before us is the retroactive applicability of *Anderson*, respondent also argues at some length the superiority of the analysis in *Anderson* over that of *Carlos*, implicitly suggesting that our ultimate conclusion should be substantially influenced by that which is the "better" reasoned. However, the rationale of neither decision is before us. Moreover, holdings of the California Supreme Court constitute the ultimate and authoritative expression of state law. It is not our function or prerogative to adjudge the correctness of the court's analyses or to draw unwarranted inferences from a rapid judicial reexamination and reversal of any particular decision. Rather, it is our obligation to apply the law as so delineated to whatever facts may come before us, guided by relevant constitutional principles. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Tison hardly mandated that he anticipate an imminent reversal of *Carlos*.

Accordingly, we find that to try petitioner under the law as now expressed in *Anderson* would create exactly the situation condemned in *Bouie* v. *Columbia*, *supra*: "a statute precise on its face [as authoritatively construed by prior state supreme court interpretation] has been unforeseeably and retroactively expanded by judicial construction . . . ." (*Id.*, at p. 352.) And, in the final analysis, the law is clear: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (*Lanzetta* v. *New Jersey* (1939) 306 U.S. 451, 453.)

Respondent attempts to distinguish the underpinnings of *Bouie* v. *Columbia*, *supra*, by emphasizing that the judicial enlargement in that case criminalized conduct that was otherwise innocent. Thus, the defendants had no fair warning that, with a stroke of the state Supreme Court's pen, they would incur penal sanctions for actions they had no other reason to refrain from. Here, respondent argues, petitioner's assault on his victim, whether or not intended to result in her death, was *ab initio* societally unacceptable. (See, e.g., *People* v. *Sobiek*, *supra*, 30 Cal.App.3d at 474-476; see also *People* v. *Weidert* (1985) 39 Cal.3d at 836, 860, Lucas, J., concurring and dissenting.)

The distinction respondent draws is one of degree and does not alter our fundamental inquiry. "When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of opportunity to be heard and to defend [his] substantive right.' [Citation.] When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past

conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." (*Bouie* v. *Columbia*, *supra*, 378 U.S. at pp. 354-355.)

In *Bouie*, the defendants were denied the right to defend against conviction on the ground that no law penalized their conduct at the time they acted. Here, retroactive application of *Anderson* would deny petitioner the right to defend against a possible death sentence on the ground that without proof of intent the law did not categorize his conduct as a capital offense at the time he acted. "The Constitution forbids the application of any punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." (*Lindsey* v. *Washington*, *supra*, 301 U.S. at pp. 400-401.)

CONCLUSION

An accused may not be deprived of any defense against imposition of the state's most severe sanction if the law at the time of the crime permitted such a defense or did not prescribe death for the act committed. As Justice Holmes has said: "Although it is not likely a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." (*McBoyle* v. *United States* (1931) 283 U.S. 25, 27.) "'It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or kindred character, with those which are enumerated. . . .'" (*Bouie* v. *Columbia*, *supra*, 378 U.S. at p. 363, quoting Chief Justice Marshall in *United States* v. *Wiltber-*

ger (1820) 5 Wheat 76, 96, 5 L.Ed 37, 42; see also *Marks* v. *United States*, *supra*, 430 U.S. at pp. 194-195; *Keeler* v. *Superior Court*, *supra*, 2 Cal.3d at p. 635.)

As a humane nation, we take special care when an individual, no matter how culpable, may face the ultimate sanction of the death penalty: "There is no question that death as a punishment is unique in its severity and irrevocability. [Citations.] When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. [Citations.]" (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 187.) We so observe and insure.

DISPOSITION

Petition for writ of habeas corpus is granted. The trial court is directed to instruct in conformance with Carlos v. Superior Court, supra, 35 Cal.3d at pp. 153-154.

CERTIFIED FOR PUBLICATION

ARABIAN, J.

We concur:

KLEIN, P.J.

DANIELSON, J.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 3, No. B036262

S008144

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

Supreme Court
IN RE HAROLD JAMES BAERT **FILED**
JAN 19 1989
on Clerk

HABEAS CORPUS Deputy

Appellant's petition for review DENIED.

LUCAS
Chief Justice

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re	) No. B036262
HAROLD JAMES BAERT,	)
Petitioner,	) (LASC No.
On Habeas Corpus.	) A-886494)
	)

APPLICATION FOR STAY
OF ISSUANCE OF REMITTITUR
(IMMEDIATE STAY REQUESTED)

Court of Appeal - Second District

FILED

JAN 27 1989

Robert N. Wilson Clerk

Deputy Clerk

D O C U M E N T
CONSIDERED
GRANTED 2/2/89
DATE
Arabian
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[ss Justices]

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IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re	) No. B036262
	)
HAROLD JAMES BAERT,	) (LASC No. A-886494)
	) APPLICATION FOR
Petitioner,	) STAY OF ISSUANCE OF
	) REMITTITUR
On Habeas Corpus.	) (IMMEDIATE STAY RE-
	) QUESTED)

[TEXT OF REQUEST FOR STAY, ENDING WITH THE PRAYER:]

WHEREFORE, the People, applicant herein, respectfully request that this Honorable Court stay the issuance of the remittitur in this case until March 22, 1989, in order to permit the filing by the People of the State of California a petition for writ of certiorari with the Supreme Court of the United States, and that, upon the timely filing of such petition, said stay and order remain in force until final adjudication of the proceeding in the Supreme Court of the United States.

Respectfully submitted,
IRA REINER
District Attorney of
Los Angeles County

[signatories]

CALIFORNIA PENAL CODE SECTION 190.2

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(vii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture

requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. *(Added by § 6 of Initiative Measure approved Nov. 7, 1978.)*

Supreme Court, U.S.
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(2)

No. 88-1547

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

HAROLD JAMES BAERT,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Stripped of its rhetoric, the question presented by this case is:

May a judicial change in the law which eliminates an element from the substantive definition of a capital offense be applied retroactively to a crime committed prior to the change in the law, when such retroactive application will have the effect of capitally punishing a crime which was not capital when committed?

TOPICAL INDEX

	Page
TABLE OF AUTHORITIES CITED	iv
BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
INTRODUCTION	1
OPINION BELOW	3
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
A. Statement of facts	4
B. Statement of the case	4
ARGUMENT	6
I. THE ISSUE IN THE CASE AT BENCH IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT THIS COURT'S ATTENTION	8
II. THE JUDICIAL ELIMINATION OF THE INTENT TO KILL ELEMENT OF CALIFORNIA'S FELONY-MURDER BASED SPECIAL CIRCUMSTANCES MAY NOT BE RETROACTIVELY APPLIED TO RESPONDENT'S CASE	11

A. Retroactive application of a change in the law which eliminates an element of a capital offense is prohibited by the ex post facto clause of the United States Constitution. 11

B. Petitioner's responses. 14

C. The malum in se versus malum prohibitum distinction is without constitutional significance. 15

D. The "reasonableness" of the intent to kill element is not constitutionally significant. 18

E. The Carlos decision, which interpreted the California death penalty law as requiring an intent to kill as a prerequisite to capital punishment for felony-murder, was not "unreasonable." 21

F. Respondent need not prove "actual reliance" on the law as a condition precedent to asserting that its retroactive modification would deny him due process. 28

CONCLUSION 29

TABLE OF AUTHORITIES CITED

Page

Cases

Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) — passim

Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) — passim

Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798) — 12

California v. Garcia, 469 U.S. 1229, 84 L.Ed.2d 366, 105 S.Ct. 1229 (1985) — 24

Carlos v. Superior Court, 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862 (1983). — passim

Cole v. Young, 817 F.2d 412 (7th Cir. 1987) — 20

Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977) — 12

Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973) — 14

Enmund v. Florida,
458 U.S. 782, 102 S.Ct. 3368,
73 L.Ed.2d 1140 (1982) 23

Hirabayashi v. United States,
320 U.S. 81, 63 S.Ct. 1375,
87 L.Ed. 1774 (1943) 19

Hirabayashi v. United States,
828 F.2d 591 (9th Cir. 1987) 19

Hohri v. United States,
782 F.2d 227 (D.C. Cir. 1986) 19

In re Baert,
205 Cal.App.3d 514,
252 Cal.Rptr. 418 (1988) 3

In re Medley,
134 U.S. 160, 10 S.Ct. 384,
33 L.Ed. 835 (1890) 17

In re Winship,
397 U.S. 358, 90 S.Ct. 1068,
25 L.Ed.2d 368 (1970) 7

Korematsu v. United States,
323 U.S. 214, 65 S.Ct. 194,
89 L.Ed. 194 (1944) 19

Kring v. State,
107 U.S. 221, 2 S.Ct. 443,
27 L.Ed. 507 (1883) 12

Marks v. United States,
430 U.S. 188, 97 S.Ct. 990,
51 L.Ed.2d 260 (1977) 14,16

Miller v. Florida,
482 U.S. 423, 107 S.Ct. 2446,
96 L.Ed.2d 351 (1987) passim

Moore v. Wyrick,
766 F.2d 1253 (8th Cir. 1985),
cert. denied, 477 U.S. 1032,
106 S.Ct. 1242, 89 L.Ed.2d 350 2,16

Palmer v. City of Euclid, Ohio,
402 U.S. 544, 91 S.Ct. 1563,
29 L.Ed.2d 98 (1971) 14

People v. Anderson,
43 Cal.3d 1104, 240 Cal.Rptr. 585,
742 P.2d 1306 (1987) passim

People v. Arreola,
186 Cal.App.3d 1570,
231 Cal.Rptr. 472 (1986) 25

People v. Burgener,
41 Cal.3d 505, 224 Cal.Rptr. 112,
714 P.2d 1251 (1986) 25

People v. Garcia,
36 Cal.3d 539, 205 Cal.Rptr. 265,
684 P.2d 826 (1984) 24

People v. Green,
27 Cal.3d 1, 164 Cal.Rptr. 1,
609 P.2d 468 (1980) 22

People v. Hamilton,
41 Cal.3d 408, 221 Cal.Rptr. 902,
710 P.2d 981 (1985) 24

People v. Payne,
(review granted, opinion published
at 195 Cal.App.3d 1495 (1986) to
permit tracking pending review 25

People v. Ratliff,
41 Cal.3d 675, 224 Cal.Rptr. 112,
714 P.2d 1251 (1986) 24

People v. Reynolds,
186 Cal.App.3d 988,
233 Cal.Rptr. 596 (1986) 25

People v. Smith,
188 Cal.App.3d 1495,
234 Cal.Rptr. 1495 (1987) 25

Rabe v. Washington,
405 U.S. 313, 93 S.Ct. 993,
31 L.Ed.2d 258 (1972) 14

Tison v. Arizona,
481 U.S. 137, 107 S.Ct. 1676,
95 L.Ed.2d 127 (1987) passim

Weaver v. Graham,
450 U.S. 24, 101 S.Ct. 960,
67 L.Ed.2d 17 (1981) 15

Statutes

California Penal Code

Sections 187 4

Section 190.2,

subdivision (a)(15) 5

subdivision (a)(17) 5

Former Section 190.2,

subdivision (c), 24

Section 261(2) 4

Section 211 4

Court Rules

United States Supreme Court Rules

Rule 17 8

Articles

Thompson, Robert, "Judicial Independence, Judicial Accountability, Judicial Elections and the California Supreme Court: Defining the Terms of the Debate," 59 So.Cal.L.Rev. 809 (1985) 25

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PETITION FOR WRIT OF CERTIORARI
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INTRODUCTION

This is a death penalty case. In 1983, the California Supreme Court ruled that intent to kill is an element of "special circumstances," a prerequisite for death penalty eligibility under the California law, which are based on certain felony-murders.

(Carlos v. Superior Court, 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862 (1983).) In November 1987, the California Supreme Court overruled the Carlos decision and ruled that intent to kill is no longer an element of felony-murder based special circumstances. (People v. Anderson, 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306 (1987).)

The case at bar arose in August 1987, and involves alleged felony-murder based special circumstances. The trial court ruled that the Anderson decision would be applied retroactively and that the intent to kill element, which is critical under the bizarre facts of this case, would be retroactively eliminated. The California Court of Appeal ruled unanimously that the intent to kill element could not be retroactively eliminated. The California Supreme Court agreed; not a single justice voted to grant review. This Court has recently denied certiorari in an almost identical case. (Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985), cert. denied, without dissent, 477 U.S. 1032, 106 S.Ct. 1242, 89 L.Ed.2d 350.) This Court should do the same in the case at bar.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, is included in the Appendix to the Petition for Writ of Certiorari (A-1 to A-11), as is the order from the California Supreme Court denying the Petition for Review (A-12). The Court of Appeal's decision now appears as In re Baert, 205 Cal.App.3d 514, 252 Cal.Rptr. 418 (1988).

JURISDICTION

The jurisdictional prerequisites are adequately set forth at pages 4 and 5 of the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional and Statutory provisions involved in this case are adequately set forth on pages 5 and 6 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Statement of facts:

From the evidence presented at the preliminary hearing in this case, it appears that respondent acted on a fantasy of having sexual relations with an unconscious nurse by choking the victim - a uniformed medical assistant - into unconsciousness and raping her. During the sex acts, the victim began to awaken from the initial choking, and respondent choked her again, ultimately killing her. Most of the case against respondent is based on his confession in which he denied intending to kill the victim, asserting that his intent was to merely render her unconscious so that he could fulfill his fantasy.

B. Statement of the case:

Respondent is the defendant in the case of People of the State of California v. Harold James Baert, Los Angeles County Superior Court Number A886494, and is charged with violating California Penal Code sections 187 (murder), 261(2) (forcible rape), and 211 (robbery). Additionally, there are two special

circumstances charged pursuant to California Penal Code section 190.2, subdivisions (a)(15) and (17), alleging that respondent murdered the victim while engaged in the commission of the crimes of rape and attempted rape, and that he intentionally killed the victim while lying in wait. The offense is alleged to have occurred on August 21, 1987.

Respondent was arraigned on November 3, 1987. On May 27, 1988, after the commencement of jury selection but before the actual trial, the trial court ruled that it was not going to instruct the jury that intent to kill was an element of the felony-murder based special circumstances even though that was the law at the time the alleged offenses were committed holding that Anderson's overruling of Carlos would be applied retroactively to this case.

On August 1, 1988, respondent petitioned the California Court of Appeal for a writ of habeas corpus challenging the legality of his trial because of the trial court's retroactive application of a change in the law. This petition was granted on

October 26, 1988, and the California Supreme Court denied review on January 19, 1989.

ARGUMENT

The Petition for Writ of Certiorari in this case cites no authority for the proposition it advances: that a state is not bound by its own laws defining the elements of a capital crime. There is a reason for this absence of authority - there is none.

Distilled to its essentials, petitioner's argument urges this Court to demolish several of the cornerstones of our system of laws: that persons are bound by the law whether they consider the law to be reasonable or not; that persons are conclusively presumed to know the law; and that the law is binding on all even though it may be changed in the future.

To accept petitioner's argument, this Court would have to reverse scores of cases stretching across two hundred years. Additionally, if petitioner's argument is accepted, very fundamental rules will be changed. For example, if there is no conclusive presumption of knowledge of the law, then ignorance

of the law will become a defense to criminal charges. If that happens, the State will ultimately have a burden of establishing knowledge of the law beyond a reasonable doubt. (Cf., In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).) If petitioner's theory that only "reasonable" laws are binding, a necessarily subjective notion, then it is a defense that the violator of a law felt that law to be "unreasonable." If that is the law, then there are no laws, only a series of suggested rules that persons are free to follow or ignore at will. Another definition of this is anarchy.

Petitioner's argument guts the entire notion of what laws are all about. Either laws can be relied on and govern the behavior of both individuals and the State or they do not. Petitioner appears to urge that they do not. This is wrong and must be rejected.

I

THE ISSUE IN THE CASE AT BENCH IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT THIS COURT'S ATTENTION

This Court has specified the factors bearing on whether a Petition for Writ of Certiorari should be granted. In Rule 17, this Court has stated that certiorari will be granted only "when there are special and important reasons therefore." The case at bar is simply not special and important; the fundamental legal principles regarding the retroactive application of changes in the law are well established, and the precise application of those principles which is presented in this case will vanish after the final resolution of a series of cases in Los Angeles County.

The issue presented by this case has an unique history. As noted above, the California Supreme Court reversed itself on whether intent to kill was an element of felony-murder based "special circumstances" in November, 1987. Immediately after the reversal became final in the Anderson decision, the California Attorney General's Office issued a directive to all California

District Attorney's Offices stating that retroactive application of Anderson to cases which had arisen between the decision in Carlos and the decision in Anderson (the so-called "window" cases), would be a violation of due process of law. (See, Appendix A to this Opposition.) Shortly after the Attorney General's directive, the Los Angeles County District Attorney's Office issued General Office Memorandum 88-17 (included in Appendix B to this Opposition), concurring with the Attorney General's assessment and instructing its deputies not to argue that Anderson be applied retroactively to the "window" cases. This generated a substantial amount of controversy within the Los Angeles County District Attorney's Office which led to the issuance of General Office Memorandum 88-31, referred to by some deputy district attorneys as the "both sides of our mouth" memorandum. In this memorandum (also included in Appendix B to this opposition), the Los Angeles County District Attorney's Office took the position that if proof of intent is "clear" the prosecutor should urge the application of the Carlos intent-to-

kill rule, but if proof of intent is not clear, the prosecutor should urge that Anderson be applied retroactively.

In its Petition for Review to the California Supreme Court, petitioner stated that there are several pending cases in Los Angeles County which occurred between Carlos and Anderson. The decision in the case at bar will probably not impact many of those cases because few contain a real intent to kill issue and prosecutors will not advocate the retroactive application of Anderson.

Petitioner has not cited a single case from another county in which this issue has arisen. In preparation of the reply to the California Supreme Court, the undersigned contacted representatives of several California public defender offices. In most areas there were no cases which presented the issue of the retroactivity of Anderson. In those counties which reported having such cases, the local district attorneys had followed the California Attorney General's directive, not even suggesting that Anderson be applied retroactively. There appears to be no

county other than Los Angeles in which the district attorney is attempting to do what petitioner is attempting to do. Petitioner has not disputed this. This issue is unique to Los Angeles County and has been resolved by the California courts in accordance with the views expressed by the California Attorney General. That the Los Angeles County District Attorney currently disagrees is insufficient reason to grant certiorari.

II

THE JUDICIAL ELIMINATION OF THE INTENT TO KILL ELEMENT OF CALIFORNIA'S FELONY-MURDER BASED SPECIAL CIRCUMSTANCES MAY NOT BE RETROACTIVELY APPLIED TO RESPONDENT'S CASE

A. Retroactive application of a change in the law which eliminates an element of a capital offense is prohibited by under the ex post facto clause of the United States Constitution.

As this Court has observed, the framers of the United States Constitution thought the prohibition on ex post facto laws to be of such moment that they included two bars on such laws in the Constitution: one which enjoins the Federal government and, unlike many of the federal constitutional restrictions which

have been made applicable to the States only though the operation of the Fourteenth Amendment, one which operates directly against the States. (See, Kring v. State, 107 U.S. 221, 225-226, 2 S.Ct. 443, 27 L.Ed. 507 (1883).)

In 1798, this Court stated that a criminal law would be an illegal ex post facto law if it met any of the following tests:

> "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates the crime or makes it greater than it was when committed; (3) every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed; (4) any law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." (Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).)

This test continues to be applied today. (See, e.g., Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).)

There can be no question but that the California Court of Appeal was correct in holding that the elimination of the intent

to kill element from the felony-murder based special circumstances falls within the ex post facto prohibition: it would clearly make the crime in this case more serious by increasing it from a non-capital homicide to a capital homicide; it would increase the available punishment from a maximum term of 25 years-to-life to death; and it would lessen the evidence that would have to be presented in order to convict respondent of a capital murder by deleting the necessity to prove an intentional killing.

Most commonly, the ex post facto prohibition has operated against legislative attempts to enact retroactive laws. However, this Court has made it abundantly clear that:

> "...an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids....If a state legislature is barred by the ex post facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. ...The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' [citation omitted], must apply to bar retroactive criminal prohibitions emanating from courts as well as legislatures." (Bouie v. City of Columbia, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), emph. added.)

This Court has never wavered from the Bouie rule, which has been followed to invalidate retroactive applications of decisional laws in Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Palmer v. City of Euclid, Ohio, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971); and Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973) (see also, Rabe v. Washington, 405 U.S. 313, 93 S.Ct. 993, 31 L.Ed.2d 258 (1972)), as well as many cases from the lower federal and various state courts. Accepting petitioner's argument will mean overruling not only Bouie and Marks, the leading cases from this Court, but also a substantial body of law from other courts.

B. Petitioner's responses.

Petitioner has proposed two arguments in this Court and another argument below in an attempt to have Bouie and Marks and similar cases overruled: (1) the ex post facto/due process rule asserted in Bouie and Marks cannot apply to respondent because his conduct was inherently wrong, and, therefore, he could not claim to be in a position of relying on the law when

he committed his criminal acts; (2) the California Supreme Court's decision interpreting the California death penalty law as requiring an intent to kill was "unreasonable," and, by extension, not binding; and (3) not raised here but raised below, respondent has not established that he personally relied on the existing law. As the California Court of Appeal ruled, none of these contentions has any merit at all.

C. The malum in se versus malum prohibitum distinction is without constitutional significance.

Petitioner's argument that respondent's constitutional right to notice is not violated because the malum in se nature of his conduct must have placed him on notice that his conduct was illegal has been made before and universally rejected, because of the well-established corollary that a person in entitled to notice of the consequences of his acts. (E.g. Miller v. Florida, supra, 482 U.S. 423; Weaver v. Graham, 450 U.S. 24, 31, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).) The Carlos decision gave notice that a non-intentional killing could not result in the death penalty in California. If there is any validity to the proposition that capital

punishment is justified as a deterrent to crime, that deterrence can occur only in those situations where the criminal was on notice that he could receive the death penalty.

Petitioner's argument was made and specifically rejected in Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985), cert. denied, without dissent, 477 U.S. 1032, 106 S.Ct. 1242, 89 L.Ed.2d 350. In Moore, the prosecution argued that even though there was controlling precedent from the state supreme court to the effect that the defendant's conduct - participation in an armed robbery which led to the accidental death of a victim at the hands of another victim - was not a first degree felony-murder, the defendant must have been on notice that his conduct was illegal, and therefore could not avail himself of the Bouie/Marks rule. The Eighth Circuit held that the controlling precedent from the state supreme court placed the defendant on notice that his conduct could not lead to a first degree murder conviction, meaning that even though the defendant knew that engaging in an armed robbery was illegal, he could not be charged with

knowledge that the accidental killing of a victim by another victim would lead to a first degree felony-murder conviction.

The same is true in the case at bar. Respondent knew that his conduct was illegal. However, at the time of his acts there was controlling precedent from the California Supreme Court to the effect that a non-intentional killing occurring during the commission of a felony was not a capital offense. Therefore, respondent could not have been on notice that an unintentional killing would subject him to the death penalty; the law was clear that it could not.

Significantly, petitioner does not even suggest that a legislature could enact an ex post facto law validly affecting malum in se crimes. That would be clearly illegal. (In re Medley, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890); Miller v. Florida, supra, 482 U.S. 423.) As this Court ruled in Bouie, a state cannot do judicially that which it cannot do legislatively. Therefore, petitioner's "malum in se" argument is contrary to Bouie and the legion of cases which follows it.

No court has accepted the malum in se versus malum prohibitum rationale because it is wrong and inconsistent with the requirement of notice and the prohibition against increasing punishment after the act. Again, to accept petitioner's position, this Court would have to overrule many state and federal decisions on this point, covering both judicial and legislative changes in the law.

D. The "reasonableness" of the intent to kill element is not constitutionally significant.

Petitioner's primary argument is that Carlos was an "unreasonable" decision, and therefore not subject to being relied upon by the citizens of California. This premise is simply wrong; the whole point of the doctrine of stare decisis is that a legal system breaks down if the decisions of the highest courts are not binding and subject to reliance by its citizens. Decisions of courts of appeal and supreme courts do not simply resolve individual disputes, they also make the law.

"Reasonableness" has never been the test, rather - reliance on binding judicial precedent has been upheld regardless of

reasonableness. A contemporary example illustrates this. There has probably been no action taken by the United States in this century that has been more thoroughly repudiated than the internment of Japanese-Americans during World War II. However, this unreasonable action was upheld by this Court twice. (Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 194, 89 L.Ed. 194 (1944); Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943).) Regardless of the fact that this action has been determined to be "unreasonable" over the years (see, e.g., Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987)), the fact that this Court approved it has been a contributing factor to the denial of civil relief for the internees. (See, e.g., Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), rhrg. denied 793 F.2d 304.) The rule of law, not some subjective concept of "reasonableness," is controlling. If that is not the case, citizens are not bound by laws which they subjectively believe to be unreasonable.

In Cole v. Young, 817 F.2d 412 (7th Cir. 1987), the defendant urged that he had been denied due process of law in a state criminal proceeding because state court decisional law in effect at the time of his offense which defined the elements of the crime with which he was charged was not applied to his case. In response to this argument, the State urged that the decision which the defendant was urging was incorrect and restricted by subsequent cases.

The Seventh Circuit rejected this argument and ruled that the defendant was entitled to the benefit of that earlier decision, noting:

> "This argument need not detain us long. It is not our place to determine whether [the earlier case] was correctly decided. Our sole task is to ascertain the applicable Wisconsin law and [the earlier case] was the law at the time of Cole's offense. (Id., at 419, emph. added.)

Indeed, that is exactly the proper test: what was the law when the alleged offense was committed? In the case at bar, the law was that there could be no death sentence under a felony-murder theory for non-intentional killers. That ends the inquiry.

To adopt petitioner's argument, yet another long-established line of cases will have to be overruled.

E. The Carlos decision, which interpreted the California death penalty law as requiring an intent to kill as a prerequisite to capital punishment for felony-murder, was not "unreasonable."

Even if this Court was to accept petitioner's unprecedented claim that only "reasonable" laws are binding, it is clear that the interpretation of California law which included intent to kill as an element of felony-murder based special circumstances was not unreasonable. Indeed, the reasonableness of the whole concept of the death penalty for non-intentional killers has been the subject of heated debate within this Court. (See, Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).)

Petitioner misleads this Court when it asserts that Carlos was based solely on a misreading of this Court's decisions.[1]

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[1] An understanding of exactly what the Carlos opinion said and how it reached the conclusion it did is critical to the proper resolution of the "reasonableness" issue. Petitioner's simplistic explanation of this highly complex decision is misleading and simply inaccurate.

The California death penalty law attempts to satisfy the requirement that there be a "principled distinction" between capital and non-capital murders through the definition of several "special

circumstances," the presence of which allows the imposition of capital sentencing. (People v. Green, 27 Cal.3d 1, 61, 164 Cal.Rptr. 1, 609 P.2d 468 (1980).)

Prior to 1978, California's death penalty law was embodied in a set of Legislatively created statutes, one of which, former California Penal Code section 190.2, subdivision (c), contained two qualifications on felony-murder based special circumstances: the defendant must have been personally present during the act or acts which caused death; and the defendant must have directly committed the death-causing act, or physically aided its commission with the intent to cause death.

In 1978, the entire death penalty law was rewritten by popular initiative. Many of the previous limitations, including the requirement that the murder be wilful, deliberate, and premeditated, the physical presence requirement, and the language relating to intentional killing were absent from the initiative. Carlos v. Superior Court, supra, 35 Cal.3d 131, was the California Supreme Court's attempt to deal with the missing language regarding intent.

In the Carlos opinion, the California Supreme Court discussed several issues in ruling that felony-murder based special circumstances charged under the 1978 death penalty initiative include an intent to kill as an element. The first step was to attempt to determine the intent of the voters in passing the initiative. The voter pamphlet regarding the death penalty initiative stated that the initiative was aimed at changing the physical presence requirement of the earlier death penalty law, but was silent on the intent to kill requirement which was also part of that law. (35 Cal.3d at 143-145, particularly fn. 11, 12 and 13.) In concluding that the death penalty initiative did not include a change in the intent to kill requirement, the California Supreme Court noted:

> "The adoption of a law to permit infliction of the death penalty upon an accidental killer would be a momentous step, raising grave moral questions. Nothing in the ballot arguments suggested that the framers intended to take such a step. [Footnote deleted.] We conclude that the history of the initiative, as well as its wording, supports a construction limiting the felony-murder special circumstances to persons who intend to kill or aid in a killing. (35 Cal.3d at 145.)

The California Supreme Court then undertook to examine the initiative in terms of California's rules of statutory interpretation. It

Rather, Carlos was based almost entirely on an interpretation of the requirements of California law. The discussion of this Court's decisions merely supported the conclusion which was reached on other grounds.

There was nothing which occurred in the period between the Carlos and Anderson decisions to make one believe that

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concluded that application of California's long standing rule that criminal defendants are entitled to the benefit of any reasonable doubt about the construction of a penal law meant that the intent to kill element must still be proven under the death penalty initiative. (35 Cal.3d at 145-147.) In arriving at this conclusion, the California Supreme Court examined the purposes of the felony-murder rule and the death penalty and opined that the purpose of the death penalty law was to distinguish between those murders which are deserving of the death penalty from those which are not, reasoning that application of the death penalty to only those persons who intentionally killed was consistent with that purpose and consistent with traditional rules of statutory construction. (Ibid.)

Lastly, the California Supreme Court discussed this issue in terms of its interpretation of this Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and stated that Enmund could reasonably be interpreted as standing for the proposition that the purposes of the death penalty are not served by putting people to death for killings they did not intend to commit and ruled that allowing this to happen would conflict with the Federal Constitutional requirement that there be a "principled way" to distinguish capital from non-capital murders. (35 Cal.3d, at 147-153.) Later cases characterized this intent to kill requirement as an element of felony based special circumstances. (E.g., People v. Anderson, supra, 43 Cal.3d 1104, 1139.)

Carlos was even erroneous.[2] However, after California's

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[2] Indeed, all of the outward signs were just the opposite. For example, the State petitioned this Court for certiorari in People v. Garcia, 36 Cal.3d 539, 205 Cal.Rptr.265, 684 P.2d 826 (1984), which applied Carlos retroactively, and that petition was denied. (California v. Garcia 469 U.S. 1229, 84 L.Ed.2d 366, 105 S.Ct. 1229 (1985).) Significantly, no justice of this Court voted to grant the petition for writ of certiorari in Garcia. During this interim period, there were no scholarly articles attacking the intent to kill requirement embodied in Carlos as unreasonable and unsupported by the law. As late as December 31, 1985, Justice Mosk, the ultimate author of the Anderson decision wrote an opinion reaffirming Carlos and chiding then-Justice Lucas for his criticism of Carlos. (People v. Hamilton, 41 Cal.3d 408, 439, 221 Cal.Rptr. 902, 710 P.2d 981 (1985), Mosk, J., concurring and dissenting.)

As Justice Broussard noted in his dissent in Anderson, the California Supreme Court reversed thirteen death judgments due to Carlos error. (People v. Anderson, supra, 43 Cal.3d 1104, 1152 and 1152, fn. 2, Broussard, J., dissenting.) As late as People v. Ratliff, supra, 41 Cal.3d 675, the last death penalty reversed for Carlos error, there was only one dissenting justice who was critical of Carlos. Additionally, scores of special circumstance cases in which life imprisonment without possibility of parole was imposed were reversed by the California courts of appeal.This is hardly evidence that Carlos was about to become "unreasonable."

Petitioner makes much of the decisions in Tison v. Arizona, supra, 481 U.S. 137, and Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) as undermining Carlos. Bullock has absolutely no impact on Carlos and the necessary impact of Tison is minimal. In Bullock, the defendant was convicted by a jury of capital murder and, in a sentencing hearing, the jury also found that two statutory aggravating circumstances were true and that they were not outweighed by any mitigating factors. The jury instructions which were given did not require a finding that the defendant either killed or intended to kill as thought to be required by Enmund v. Florida, supra, 458 U.S. 782. This Court's decision in Bullock was procedural, holding that the "intent to kill" issue need not be decided by the jury and could be left to the trial judge or an appellate court to decide. Indeed, the ultimate result in Bullock was an order remanding the

matter to the Federal District Court with directions to issue a writ of habeas corpus vacating the death sentence and leaving the state with the option of reimposing the death sentence after making a finding that Bullock either killed, attempted to kill, or intended to kill. (Cabana v. Bullock, supra, 474 U.S. 376, 390-392.)

Bullock's impact on California law was discussed twice in California legal materials prior to the Anderson decision. In People v. Payne (review granted, opinion published at 195 Cal.App.3d 1495, 223 Cal.Rptr. 458 (1986) to permit tracking pending review), Bullock was discussed in Justice White's dissent from the reversal, and he noted that Bullock would permit an appellate court to make the intent to kill determination if the jury failed to do so. (195 Cal.App.3d at 1505.)

Former California Court of Appeal Justice Robert Thompson described Bullock as affecting only the right to a jury finding at the sentencing phase of a capital trial and noted that it empowers the trial judge to make the intent to kill finding. ("Judicial Independence, Judicial Accountability, Judicial Elections and the California Supreme Court: Defining the Terms of the Debate," 59 So.Cal.L.Rev. 809, 850.) This, he reasoned, called only for a reassessment of Garcia's concepts of harmless error when Carlos error existed, not the intent to kill requirement itself. (Ibid.)

A careful reading of Bullock leads to the conclusion that this Court was not backing away from any intent to kill requirement which may have existed in its jurisprudence at that point. If anything, the Bullock decision reaffirmed the requirement but allowed a broader procedure for fulfilling it. This result is supported by the reaction of California courts to Bullock. Both People v. Burgener, 41 Cal.3d 505, 536-537, 224 Cal.Rptr. 112, 714 P.2d 1251 (1986), and People v. Ratliff, supra, 41 Cal.3d 675 were decided after Bullock and resulted in reversals for Carlos error. Indeed, in Ratliff, the prosecution conceded Carlos error. (41 Cal.3d, at 698.) Furthermore, California courts of appeal still applied Carlos and reversed life without parole judgments based on Carlos error after Bullock was decided. (E.g., People v. Smith, 188 Cal.App.3d 1495, 1505-1516, 234 Cal.Rptr. 1495 (1987); People v. Reynolds, 186 Cal.App.3d 988, 233 Cal.Rptr. 596 (1986); People v. Arreola, 186 Cal.App.3d 1570, 1575-1576, 231 Cal.Rptr. 472 (1986).) It is clear that Bullock did nothing to render reliance on Carlos unreasonable.

The impact of Tison v. Arizona, supra, 481 U.S. 137 on

retention election resulted in the appointment of three new Justices to the Supreme Court, the new Court reexamined the bases of the Carlos decision and "reinterpreted" much of the same material that it had in Carlos. The Court reached the opposite result, reversing Carlos to the extent that it required proof of an intent to kill for actual killers. (People v. Anderson, supra, 43 Cal.3d 1104.[3] Until Anderson was decided, there was

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California's death penalty law turned out to be enormous; it ostensibly precipitated Anderson's reexamination of Carlos. (People v. Anderson, supra, 43 Cal.3d 1104, 1138-1141.) However, when Tison was decided, its necessary impact was minimal. Tison held two things: there is no federal intent to kill requirement for actual killers; and aiders and abettors may be capitally prosecuted if they harbor "reckless indifference" to whether someone dies. Admittedly, this was a retreat from what was stated in Enmund, but it did not mean that Carlos was necessarily undermined. This Court's reading of California law was inconsistent regarding both its requirements and Tison's potential impact. (Compare, 481 U.S. 153, fn. 8, to the dissent of Justices Brennan, Marshall, Blackmun and Stevens, 481 U.S. 175-176, fn. 13.)

[3] At the threshold, the Court examined Enmund v. Florida, supra, 458 U.S. 782 in light of its reading of Cabana v. Bullock, supra, 474 U.S. 376 and Tison v. Arizona, supra, 481 U.S. 137 and decided that it had interpreted Enmund too broadly. (People v. Anderson, supra, 43 Cal.3d 1104, 1138-1141.)

Having decided that one of the "bases" on which Carlos had rested was proven "unsound" (43 Cal.3d at 1141), the California Supreme Court elected to reconsider whether intent to kill is an element of felony-murder based special circumstances. It reanalyzed the language of the voters' pamphlet and the other legislative history surrounding the 1978 death penalty initiative and reached the

absolutely nothing in the law which would have compelled the conclusion that Carlos was wrong, much less unreasonable. Furthermore, even though Anderson overruled Carlos, there is nothing in that decision to indicate that Carlos was unreasonable, contrary to petitioner's assertion. Indeed, Justice Broussard read

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conclusion that nothing in that history or language led to the conclusion that intent to kill was an element of a felony based special circumstance in the case of an actual killer. (43 Cal.3d, at 1141-1148.) Reversing its earlier statements, the new California Supreme Court decided that the language of Penal Code section 190.2 was no longer ambiguous and came to the conclusion that, contrary to the way they had been read previously, the "extrinsic aids" which had previously been used to determine legislative intent now led the conclusion that the voters did not intend to make an intent to kill an element of the felony based special circumstances, (43 Cal.3d at 1142-1143), and that an intent to kill was not necessary to meaningfully distinguish death from non-death cases. (43 Cal.3d at 1143-1146.) The Supreme Court also decided that a death penalty law which killed non-intentional killers was no longer a "momentous step" (saying nothing about "grave moral questions"). (43 Cal.3d at 1145, fn. 8.)

The end result was that Carlos was overruled and, after Anderson, the state need no longer prove an intent to kill as an element of a felony based special circumstance in the case of an actual killer. While Carlos may have had an extreme ultimate result, the reversal of over a dozen death verdicts and the downfall of three California Supreme Court justices, it was a decision that was consonant with all of California's previous death penalty decisions and consistent with the application of California's traditional rules of statutory construction. As Justice Broussard noted, the "political winds" in California may have "gust[ed] in a new direction," but the conclusion reached in Carlos was never unreasonable.

the majority opinion in Anderson as conceding that Carlos was correct when decided. (People v. Anderson, supra, 43 Cal.3d 1104, 1154, Broussard, J., dissenting.)

F. Respondent need not prove "actual reliance" on the law as a condition precedent to asserting that its retroactive modification would deny him due process.

Although not argued directly, petitioner has hinted that a defendant must be able to establish that he actually relied on a law prior to asserting that retroactive application of a change in that law would deny him due process. This argument is both illogical and unsupported by any authority, again because there is none.

It is a fundamental tenant of our law that a person is presumed to know the law when they act. This presumption underlies both the ex post facto/due process prohibition on retroactive application of deleterious changes in the law and rule that ignorance of the law is no defense to a crime. This presumption cannot be eliminated without creating an "ignorance of the law defense."

CONCLUSION

Petitioner has proposed that this Court scrap many of the very fundamental rules that govern our system of laws. Why? So that the Los Angeles County District Attorney can defy the legal opinion rendered by the California Attorney General and apply a change in the law retroactively to a small number of cases. This is not a valid reason to rewrite 200 years of law and overrule scores of cases from all levels of state and federal courts. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PUBLIC DEFENDER OF LOS ANGELES COUNTY, CALIFORNIA

Laurence M. Sarnoff,
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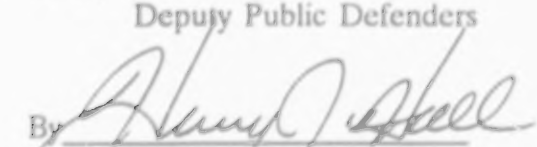
By 
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APPENDIX A

JOHN K. VAN DE KAMP
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DEPARTMENT OF JUSTICE

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January 8, 1988

L.A. COUNTY
JAN 1

To: ALL DISTRICT ATTORNEYS

Re: People v. Anderson

In People v. Anderson (1987) 43 Cal.3d 1104, the California Supreme Court overruled its prior decision in Carlos v. Superior Court (1983) 35 Cal.3d 131, insofar as that case had required the jury to find an intent to kill as an element of felony-murder special circumstances for the actual killers. In the wake of Anderson, questions have arisen as to its possible retroactive application, in a variety of procedural situations.

The cases to which Anderson might be applied may be grouped into two classes: (1) those in which the murder was committed before the Carlos decision; and, (2) those in which the murder was committed before Anderson, but after Carlos. The two classes share a number of factual variations; cases in either class might now be in retrial, initial trial, or somewhere in the appellate process. The advice offered in this letter cuts across all such distinctions; within each class, cases may be treated similarly.

Anderson may be fully applied to the pre-Carlos class of cases. The California Supreme Court so applied it in People v. Gates (1987) 43 Cal.3d 1168, to a murder which had been committed in 1979. Even where the case has been remanded in light of Carlos, application of Anderson would likely be appropriate. Nothing in the law of the case doctrine would preclude it. (See People v. Sequeira (1982) 137 Cal.App.3d 898.) If the case is now in trial, a motion to amend the information to allege the special circumstance could be made, assuming proof of same was presented at the preliminary hearing. (Penal Code sec. 1009; Talamantez v. Superior Court (1981) 122 Cal.App.3d 629.)

However, in our judgment Anderson should not be applied to those cases in which the murder occurred in the Carlos-Anderson "window" period. (Marks v. United States (1977) 430 U.S. 188; Bouie v. City of Columbia (1964) 378 U.S. 347.) Marks and Bouie have been applied by the United States Court of Appeals for the

Ninth Circuit to precisely this situation. In United States v. Goodheim (9th Cir. 1981) 651 F.2d 1294, the panel held that an intervening judicial decision interpreting a statute more stringently against the defendant, could not be applied to him. He was entitled to rely on the judicial construction which obtained previously, at the time he committed his crime. (Compare Darnell v. Swinney (9th Cir. 1987) 823 F.2d 299.) Even if a case could survive judicial scrutiny in California state courts, we believe it might be seriously compromised when considered on federal habeas corpus review. Accordingly, we recommend against Anderson's application to such cases.

Should you have questions in this matter, please contact our local death penalty coordinator in your area: DAG Ward Campbell, Sacramento, (916) 324-5251; DAG Dane Gillette, San Francisco, (415) 557-1475; DAG Tom Willhite, Los Angeles, (213) 736-2193; and, DAG Mike Wellington, San Diego, (619) 237-7666.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

STEVE WHITE
Chief Assistant Attorney General

SW:hfw/vdb

APPENDIX B

GENERAL OFFICE MEMORANDUM 88-17

TO: ALL DEPUTY DISTRICT ATTORNEYS
ALL INVESTIGATORS

FROM: GILBERT GARCETTI
Chief Deputy District Attorney

SUBJECT: RETROACTIVITY OF PEOPLE v. ANDERSON
RULE ON INTENT TO KILL

DATE: FEBRUARY 4, 1988

In General Office Memorandum 87-99, dated November 30, 1987, People v. Anderson, 43 Cal.3d 1104, was summarized. Anderson overruled Carlos v. Superior Court (1983) 35 Cal.3d 131, and thereby eliminated the intent-to-kill element of the felony murder special circumstance with respect to the actual killer.

The summary stated that the Anderson rule means that we do not have to prove, at the retrial of a case which has been reversed, that the actual killer had an intent to kill.

The purpose of this memorandum is to modify this statement. The ex post facto clauses of the federal and California constitutions limit the powers of the legislature and do not of their own force apply to the judicial branch. Nonetheless, the principle of fair warning underlying the ex post facto clauses limits the retroactive application of judicial decisions. Due process of law is violated when a defendant is convicted under an unforeseeable interpretation of a statute which expands its scope. (Bouie v. Columbia (1964) 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894; Marks v. United States (1977) 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260.) The due process analog of the ex post facto clauses also applies to special circumstances. (People v. Weidert (1985) 39 Cal.3d 836, 850-851.)

Anderson can be validly applied to cases involving murders which took place before the date Carlos v. Superior Court was decided, i.e., December 12, 1983. Due process of law is not violated by such retroactive application since the offender, i.e., an actual killer whose offense took place before Carlos was decided, cannot reasonably claim that the Anderson holding constitutes an unforeseeable statutory interpretation. (See Forman v. Wolff (9th Cir.

1979) 590 F.2d 283.) The California Supreme Court has retrospectively applied Anderson in People v. Gates (1987) 43 Cal.3d 1168, to a murder which had been committed in 1979. Even where the case has been remanded in light of Carlos, application of Anderson would likely be appropriate. Nothing in the law of the case doctrine would preclude it. (See People v. Sequeira (1982) 137 Cal.App.3d 898.) If the case is now in trial, a motion to amend the information to allege the special circumstance could be made, assuming proof of same was presented at the preliminary hearing. (Penal Code Section 1009; Talamantez v. Superior Court (1981) 122 Cal.App.3d 629.)

On the other hand, a very cogent (although perhaps not conclusive) argument can be mounted to support the proposition that due process of law is violated by the retrospective application of the Anderson holding with respect to intent to kill as to murders which were committed on and after the date Carlos was decided (i.e., December, 1983, but before the date of Anderson (October 13, 1987). (See e.g., Moore v. Wyrick (8th Cir. 1985) 766 F.2d 1253; United States v. Goodheim (9th Cir. 1981) 651 F.2d 1294; but see Darnell v. Swinney (9th Cir. 1987) 823 F.2d 299.)

Because of the high probability of the validity of this argument, it is the policy of this office that the Anderson holding regarding intent to kill will not be relied upon with respect to murders committed on or after December 12, 1983, until the date Anderson was decided, i.e., October 13, 1987.1/

The Attorney General's Office has adopted a position with respect to the retrospectivity of Anderson which is essentially identical with that adopted herein.

jw

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1. It cannot be plausibly argued that the Carlos window extends to the date that Anderson became final (November 12, 1987) because the Anderson decision on October 13, 1987, gives fair notice of foreseeable statutory interpretation.

GENERAL OFFICE MEMORANDUM 88-31

TO: ALL DEPUTY DISTRICT ATTORNEYS (Criminal)

FROM: GILBERT GARCETTI
Chief Deputy District Attorney

SUBJECT: RETROACTIVITY OF PEOPLE V. ANDERSON RULE ON INTENT TO KILL

DATE: MARCH 28, 1988

In People v. Anderson (1987) 43 Cal.3d 1104, the Supreme Court eliminated the intent-to-kill element of the felony murder special circumstance with respect to the actual killer, thereby overruling Carlos v. Superior Court (1983) 35 Cal.3d 131. Anderson clearly applies retroactively to murders committed before the date of the Carlos decision, December 12, 1983, as the murders in both Anderson and People v. Miranda (1987) 44 Cal.3d 57 were committed before this date. (See People v. Easter (1987) 197 Cal.App.3d 183.)

General Office Memorandum 88-17 (February 4, 1988), set forth an office policy that the Anderson holding regarding intent to kill would not be relied upon for murders committed between December 12, 1983, the date of the Carlos decision, and October 13, 1987, the date of the Anderson decision. This time period has been referred to as the "Carlos-window" period. Although the law regarding the retroactivity of Anderson is unclear, we believe such an interpretation is prudent for most cases coming within this time period.

Thus, in a Carlos-window case, if a trial deputy believes the identity of the defendant as the actual killer and the existence of his intent to kill can be proven beyond a reasonable doubt, the deputy should have the jury instructed in accordance with Carlos. This will avoid any potential reversal and retrial because of a Carlos error which was not essential to a conviction.

In some cases coming within this Carlos-window period, the trial deputy may be uncertain whether a jury would reasonably find that the defendant, who was the actual killer, had an intent to kill. In these cases, the trial deputy should argue that Anderson applies retroactively. In our judgment, this is the better view and should be argued when necessary to insure a conviction of the appropriate charges.

A trial deputy advocating the retroactive application of Anderson should attempt to litigate this issue before trial. The prosecutor should amend the

special circumstance allegation to state that the defendant was the actual killer and that he/she had no intent to kill. The trial deputy should explain to the court that this procedure will enable the issue of retroactivity to be settled before trial, as either side may seek appellate review of the trial court's ruling before the trial commences. Thus, the possibility of a retrial on this issue would be avoided.

A prosecutor may amend a pleading any time before the defendant pleads or a demurrer to the original pleading is sustained. Otherwise, the pleading may only be amended with the court's permission. (Pen. Code Section 1009.) If the pleading is amended as suggested, the defense could demur to the complaint on the basis that "the facts do not constitute a public offense," or that "it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution." (Pen. Code Section 1004.) Either party may seek immediate appellate review of the trial court's decision. A sample trial brief on this issue will be available from the Appellate Division.

ck

COPY

NO. 88-1547

Supreme Court, U.S.
FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HAROLD JAMES BAERT,
RESPONDENT.

REPLY

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TABLE OF CONTENTS

	Pages
REPLY	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Pages
Bouie v. Columbia, 378 U.S. 347 (1964)	2-5
Cabana v. Bullock, 474 U.S. 376 (1986)	7
Carlos v. Superior Court, 35 Cal.3d 131 (1983)	2, 5-7
Cole v. Young, 817 F.2d 412 (7th Cir. 1987)	3
Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987)	2, 4
In re Ramirez, 39 Cal.3d 931 (1985)	6
Marks v. United States, 430 U.S. 188 (1977)	5

Cases (continued)	Pages
Maynard v. Cartwright, 486 U.S. ___ (1988)	2, 3
Miller v. Florida, 482 U.S. 423 (1987)	5
Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985)	3, 4
Morrissey v. Brewer, 408 U.S. 471 (1972)	6
People v. Garcia, 36 Cal.3d 539 (1984)	5
People v. Malone, 47 Cal.3d 1 (1988)	2, 7
People v. Poggi, 45 Cal.3d 306 (1985)	6
People v. Robert Clark, Unpub. Cal. App. No. G006488 (May 31, 1989)	3
People v. Sobick, 30 Cal.App.3d 458 (1973)	5
People v. Weidert, 39 Cal.3d 836 (1985)	7
People v. Anderson, 43 Cal.3d 1104 (1987)	1, 2, 5-7

Cases (continued) — Pages

Tison v. Arizona, 481 U.S. 137 (1987) — 7

Whitehorn v. Harrelson, 758 F.2d 1416 (11th Cir. 1985) — 6

United States Constitution

Article I, §§ 9, 10 — 6

California Penal Code

Section 190.2, subds. (a)(17)(i), (iii) — 8

Rules Of The United States Supreme Court

Rule 22.5 — 1

NO. 88-1547

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HAROLD JAMES BAERT,
RESPONDENT.

REPLY

As permitted by rule 22.5, the People of the State of California[1] reply to the Brief of Respondent in Opposition[2] to the People's Petition for Writ of Certiorari[3].

In trying to restate the question presented in this case, BRO at i, respondent Baert fell into the same trap as the court below. The assumption underlying his attempted restatement of the question presented is that the *Anderson*[4] case changed California law. Not so. *The law*, as enacted by California

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1. Hereinafter, People.

2. Hereinafter, BRO.

3. Hereinafter, Petition.

4. *People v. Anderson*, 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306 (1987).

voters, was on the books before *Anderson*, before *Carlos*,[5] and at the time of the alleged murder of Mrs. McAlindon by Baert. It is only the state court's view of the law that has changed. Whereas the California Supreme Court at first viewed the statute as ambiguous, see *People v. Malone*, 47 Cal.3d 1, 25, 252 Cal.Rptr. 525, 762 P.2d 1249 (1988), *modified* 47 Cal.3d 745a, it later concluded that no "*realistic* doubt" exists as to the meaning of the statute. *People v. Anderson*, 43 Cal.3d at 1146. The People of the State of California present this Court not a question of ex post facto involving changes in the law, but of due process involving notice. They are not the same and the rules for applying them are different.

The proposition advanced here by the People is not "that a state is not bound by its own laws," BRO at 6, but, instead, that the state may fairly apply its law to Baert as the law existed at the time of the murder of Mrs. McAlindon. In other words, *Carlos* did not dispel the presumed notice afforded by the statute to Baert and similarly-situated murderers, and application of the statute to them satisfies due process. See *Darnell v. Swinney*, 823 F.2d 299, 300-301 (9th Cir. 1987), *cert. denied* 98 L.Ed.2d 978, 108 S.Ct. 1012.

This Court has recently said that due process objections resting on lack of notice and not involving First Amendment interests "may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. ___, ___, 100 L.Ed.2d 372, 380, 108 S.Ct. 1853, 1858 (1988). Thus, the application of due process principles prevented prosecution of the defendants in *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964), because they had no way of knowing that their conduct was at risk under the statute South Carolina used to prosecute them.

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5. *Carlos v. Superior Court*, 35 Cal.3d 131, 152, 197 Cal.Rptr. 79, 672 P.2d 862 (1983), *overruled in Anderson*, 43 Cal.3d at 1115, 1147.

When viewed in this light, the issue in this case warrants this Court's resolution. Absent that resolution, lower courts will continue to mistake concerns of due process for those of ex post facto, as did (1) the court below, (2) the Eighth Circuit in the case relied upon by the court below[6] and by Baert,[7] *Moore v. Wyrick*, 766 F.2d 1253 (1985), *cert. denied*, 477 U.S. 1032, 89 L.Ed.2d 350, 106 S.Ct. 1242, and (3) the Seventh Circuit in another case relied upon by Baert,[8] *Cole v. Young*, 817 F.2d 412, 420-421 (1987), and, as Baert indicates, as even California law enforcement officers have done. BRO at 8-9.[9] "The net result is that [*Bouie* has been stretched] far beyond its reasoning and its holding." *Moore v. Wyrick* at 1261 (Gibson, Cir.J., dissenting). None of these federal cases relied upon by Baert have analyzed under the particular facts of their case whether "reasonable persons would [have known] that their conduct was at risk." *Maynard v. Cartwright*, 100 L.Ed.2d at 380.

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6. Petition at A-7 [205 Cal.App.3d at 520].

7. BRO at 2, 16.

8. BRO at 20.

9. Baert characterizes the issue in this case as "unique to Los Angeles County." BRO at 11. But that ignores federal cases from other states, some of which Baert has relied upon, that have wrestled with the same issue. The California Attorney General's office, although once espousing the view set forth in Appendix A of Baert's opposition to certiorari, has, through one of its deputies, informed this office that the Attorney General's office is presently defending the position taken by the People in this case in at least one appeal pending in the state courts. That case arises from San Diego, not Los Angeles, County, and has resulted, thus far, in an unpublished opinion from the California Court of Appeal, Fourth District, Division Three, in *People v. Robert Clark*, No. G006488 (May 31, 1989). The court in *Clark* reversed the conviction, relying upon the published decision by the court below in this case. The Attorney General has represented that if this Court grants certiorari in this case, then the People will seek review in the California Supreme Court of the *Clark* opinion before it becomes final. Obviously, this case touches more than just the eight and a half million residents of Los Angeles County, or even the much larger population of the state.

At least one federal court has refused to so stretch *Bouie*, and has analyzed the issue in proper due process terms. That case is *Darnell v. Swinney*, 823 F.2d at 300-301. Darnell argued to the Ninth Circuit that his Nevada conviction was unconstitutional under *Bouie* because under a long-standing state judicial decision his crime could not exist. In affirming his conviction, the state supreme court overruled the old case. The federal court rejected Darnell's argument that *Bouie* required voiding of his conviction, saying,

> In the present case, however, Darnell clearly had fair warning that his contemplated conduct--attempting to possess stolen property--was criminal. Thus, even if it is assumed that the Nevada Supreme Court's interpretation of Section 208.070 changed Nevada's law of criminal attempt, Darnell has failed to show that this change resulted in any surprise that affected his conduct. Nor has he shown that he was unfairly surprised in a way that affected his legal defense, since he conducted that defense with full notice that Section 280.070 was being construed against him. We therefore hold that Darnell's conviction did not violate his right to due process.

823 F.2d at 301. As in *Moore v. Wyrick*, this Court also denied a petition for certiorari in *Darnell v. Swinney*. They are at odds.

Recognition that Baert's arguments to this Court in opposition to the Petition rely upon an ex post facto rather than a due process analysis sheds light on the fallacy of his argument. For instance, and although Baert says it is "unsupported by any authority," BRO at 28, the People have cited federal authority for the proposition that only when a criminal defendant proves actual reliance upon an erroneous judicial interpretation of a statute may he rely upon it. Petition at 17.

The People admit that under an ex post facto analysis, the proposition, while not "illogical," BRO at 28, fails. But that failure is irrelevant, because under a due process analysis, the proposition succeeds, and, in fact, seems to be the very point of due process. Despite urgings to the contrary, no court has yet taken the time to apply that kind of an analysis in this case.

"[T]he [Ex Post Facto] Clauses were aimed at preventing legislative abuses" and at "a second concern, namely, that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' [Citation.]" *Miller v. Florida*, 482 U.S. 423, __, 96 L.Ed.2d 351, 359, 107 S.Ct. 2446, 2451 (1987). In *Baert*, the Court of Appeal took the stance in effect that due process mirrors the Ex Post Facto Clauses. Petition at A-1 to A-2, A-6 to A-10 [205 Cal.App.3d at 516, 519-522]. But this Court's cases which have analogized due process to ex post facto have done so because they involved (1) freedom of expression, *Marks v. United States* 430 U.S. 188, 192, 51 L.Ed.2d 260, 97 S.Ct. 990 (1977) or (2) regulation of conduct which is not immoral, as in *Bouie*, and then have done so after consideration of the facts of the cases, a concern not present in an ex post facto analysis. Absent the concerns present in those two kinds of cases, a judicial clarification of the law, when reasonable, and in spite of a previous unwarranted judicial declaration to the contrary, applies retroactively to immoral conduct without offending due process. *People v. Sobiek* 30 Cal.App.3d 458, 472, 106 Cal.Rptr. 519, 82 A.L.R.3d 804 (1973), *cert. denied*, 414 U.S. 855.

The difference between genuine ex post facto concerns and those raised by the judicial analogy to the Ex Post Facto Clauses can be seen by looking at the retroactive effect thus far given by the California Supreme Court to *Carlos* and *Anderson* and comparing that with the legislature's inability to do the same thing. *People v. Garcia* 36 Cal.3d 539, 547-549 (1984), made *Carlos* retroactive. But *People v. Poggi* 45 Cal.3d

306, 326-327 (1985), made *Anderson* retroactive over those murders committed before *Carlos*. Thus, the state court has applied two contrary constructions of the law to murders committed during the period preceding *Carlos*. The People's burden of proof would, therefore, have been different for two murders committed on the same day if one came to trial before *Anderson* and the other came to trial after *Anderson*. A legislature could never achieve that result. However, the *Anderson* Court recognized that *Carlos* was not the law, but an incorrect statement of the law. The law had been stated by the initiative enacted by the voters for all to see and read. *Carlos* tried and erred, to the benefit of some murderers whose trials occurred before the Court decided *Anderson*. There is no reason now to perpetuate the error of *Carlos*.

The Constitution makes explicit the prohibition on a *legislature*'s attempt to reach out ex post facto. U.S. CONST., art. I, §§ 9, 10. The relative inflexibility accompanying the prohibition on ex post facto application of a penal statute, involving nothing more than a determination of whether the statute is retrospective and whether it disadvantages the accused *In re Ramirez*, 39 Cal.3d 931, 934-938, 218 Cal.Rptr. 324, 705 P.2d 897 (1985), ought not to be carried over to its judicial analog, especially when such a carry-over would void the effect of legislation predating the alleged criminal activity. The requirements of due process are more flexible. *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 494, 92 S.Ct. 2593, 2600 (1972).

"The requirements of due process cannot be determined in a vacuum: 'Due process 'is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. at 481[, 486-487]." *Whitehorn v. Harrelson*, 758 F.2d 1416, 1425 (11th Cir. 1985), brackets added. Lack of notice, therefore, should violate due process only when notice is expected to be of some genuine use. This Court has not held otherwise. Any need of Baert or alleged

murderers who are similarly-situated, for more notice than he had from the statute itself has not yet been shown; indeed, it realistically cannot be shown. See *People v. Weidert*, 39 Cal.3d 836, 860, 218 Cal.Rptr. 57, 705 P.2d 380 (1985) (Lucas, J., concurring and dissenting).[10]

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10. Respondent Baert's brief in this Court includes a two-plus page footnote attacking the People's supposed reliance upon *Tison v. Arizona*, 481 U.S. 137, 95 L.Ed.2d 127, 107 S.Ct. 1676 (1987), and *Cabana v. Bullock*, 474 U.S. 376, 88 L.Ed.2d 704, 106 S.Ct. 689 (1986) "as undermining *Carlos*." BRO at 24-26, n. 2. However, no reference to those cases appears in the People's Petition for Writ of Certiorari, except to *Tison* in the opinion of the court below contained in the appendix. Petition at A-7 to A-8. As stated in the People's Petition for Rehearing in the court below,

> In addition, we wish to de-emphasize the role which this Court attributes to the case of *Tison* v. *Arizona* (1987) 481 U.S. __ [95 L.Ed.2d 127, 109 S.Ct. 1676] in support of the People's position in this Court. While we recognized that the Superior Court relied upon *Tison* (Ret. & Answ., ¶ G., p. 5), our position here has never been that Baert need be presumed acquainted with the *Tison* case, but merely presumed to have known the law as stated in the relevant California statutes in order for the statute to be applied to him as among the class of murderers to whom the People intended the statute apply even before *Carlos* was decided. (Ret. & Answ., pp. 15-16, fn. 14; *People* v. *Malone*, *supra*.)

Petition for Rehearing filed Nov. 10, 1988, in the California Court of Appeal, Second Appellate District, Division Three, at 4-5. The People's position has not changed in this Court.

The People do contend that *Carlos* was an unreasonable decision and, contrary to Baert's assertion, BRO at 27, find support for that contention in the language used in *Anderson*. Petition at 12.

CONCLUSION

The state statute gave Baert notice that murder committed during the robbery and rape of Janet McAlindon justified a penalty of death. CAL. PEN. CODE, § 190.2, subds. (a)(17)(i), (iii). The notice it gave was all the federal constitution requires. It does not require that he be presumed to have acted on an erroneous construction of the statute which has been corrected. This Court should grant certiorari.

Respectfully submitted,

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